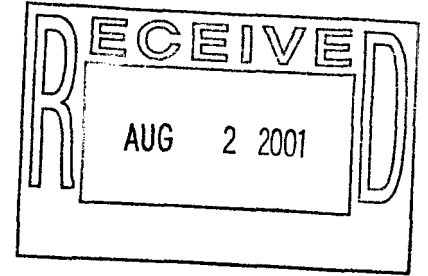


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50 CFR Part 216

[Docket No. 001031304-0304-01; I.D. 080299B]

RIN 0648-AH26

Protected Species Special Exception Permits
Proposed Rule and Request for Comments.

INTRODUCTION

This is a response to the National Marine Fisheries Service's ('NMFS') proposed rule and request for comment ('RFC') published on July 3, 2001, (66 FR 35209). The proposed rule implements the 1994 amendments to the Marine Mammal Protection Act ('MMPA'). These amendments changed the requirements for a permit necessary for the taking or importation of marine mammals meant for public display. These amendments also enhanced the procedural requirements for the sale, transport, transfer or export of marine

mammals. This comment suggests that that the proposed transfer procedures and policies read the statute too narrowly. This comment further suggests that the proposed export and comity requirement policies complies with the statute and that the NMFS and Secretary of Commerce have the inherent power to make executive agreements with foreign countries.

TRANSFER REQUIREMENTS

The pertinent sections of the statute regarding transfer read:

(c)(2)(A) A permit may be issued...for the purpose of public display only to a person which the Secretary determines -

- (i) offers a program for education or conservation based on professionally recognized standards of the public display community;
- (ii) is registered and holds a license under 7 U.S.C. 2131 et seq.; and
- (iii) maintains facilities...that are open to the public[.]

16 U.S.C. § 1374(c)(2) (A).

(B) A permit under this paragraph shall grant to the person to which it is issued the right to...

- (ii) sell, export, or otherwise transfer possession of the marine mammal[.]
- (I) for the purpose of public display, to a person that meets the requirements of clauses (i), (ii) and (iii) of subparagraph (A);

16 U.S.C § 1374 (c)(2)(B).

The NMFS reads these two sections together to mean that once a permit has been acquired the holder of that permit may transfer the associated marine mammal 'without authorization from NMFS, provided that the recipient is in compliance with the MMPA[.]'66 FR 35212. This is a very broad interpretation of the term 'authorization' that has the effect of reading the phrase 'meets the requirements' out of § 1374 (c)(2)(B)(ii) (I). It is a general rule of statutory construction that a reading that uses all the words is to be preferred to one that makes some words or phrases superfluous.

It is this author's belief that the phrase 'meets the requirements' requires the Secretary to determine whether the transferee meets the statutory requirements for public display. Just as § 1374 (c)(2)(A) requires the Secretary to determine whether the initial recipient of a permit meets the statutory criteria. Under this reading the term 'authorize' refers only to an action of the Secretary in providing a permit for the initial taking or importation of the animal. This reading is bolstered by the repetition of the combination of 'authorize' (and its variants) and the terms 'taking' and 'importation'. See e.g. § 1374 (a) ('The Secretary may issue permits which authorize the taking or importation of any marine mammal.');

§ 1374 (b)(2)(A) ('the

number and kind of animals which are authorized to be taken or imported'); § 1374 (c)(1) ('...which authorizes the taking or importation').

The effect of this reading is that the NMFS can impose additional requirements on transferees and may, at its discretion, require the proposed transferee to affirmatively demonstrate that it meets the public display criteria.

EXPORT AND COMITY REQUIREMENTS

The 1994 Amendments to the MMPA prohibited the export of marine mammals except under rare and particular circumstances. Since 1975 the NMFS had required foreign governments to sign comity letters before it allowed the export of marine mammals. 66 FR 35213. In general these letters bind the foreign government to honor decisions of the U.S. Government when such decisions can not be enforced by U.S. Courts or through agency adjudication due to lack of jurisdiction. *Id.*

In its RFC the NMFS encouraged comments on the question of the legality of its past and proposed requirement of comity letters. 66 FR 35214. The issue, as framed by the NMFS, was whether the NMFS, as an Executive

Branch agency had the inherent power to require foreign nations to sign such agreements. 66 FR 35213

The NMFS believes that requiring comity agreements before the export of marine mammals to foreign nations is a reasonable means of meeting its statutory mandate. *Id.* The agreements would ensure that the '(1) care and maintenance standards comparable to the APHIS standards that apply in the U.S are met; (2) marine mammals continue to be held for purposes consistent with section 104 of the MMPA; and (3) marine mammal inventory information for exported animals is provided to NMFS.' *Id.*

Comity letters are agreements between an Executive Branch agency and a foreign government. Such agreements are known more familiarly as Executive Agreements. While there is no explicit Constitutional authorization for Executive Agreements the Supreme Court has never failed to uphold them since they were first recognized in *United States v. Belmont*, 301 U.S. 324 (1937). Erwin Chermersky, *Constitutional Law: Principles and Policies* 271-273 (1997). This is not to say that the scope of Executive Agreements is unbounded; in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court upheld an agreement between the Executive and the nation of Iran after finding congressional authorization in the relevant statutes for such executive

discretion. 453 U.S. at 672. Justice Rehnquist, writing for the majority, cited Justice Jackson's concurrence in , *Youngstown Sheet & Tube Co. v. Sawyer* (343 U.S. 579 (1952)) for the proposition that 'the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself', 453 U.S. at 668; and Justice Frankfurter's concurrence from that same decision for the proposition that 'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned... may be treated as a gloss on Executive Power vested in the President by § 1 of Art II.' (453 U.S. at 686) (Internal quotations and citations omitted). (See also *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986)). Upholding executive agreements between the Secretary of Commerce and Japan.).

Looking at the MMPA we find statutory support for congressional authorization of executive agreements between the NMFS and foreign nations. A key section of the statement of purpose reads 'negotiations should be undertaken immediately to encourage the development of international arrangements for [the] conservation of [] all marine mammals.' 16 U.S.C. § 1361 (4). The public display export provisions of the § 1374 (infra) make little sense unless the NMFS is able to guarantee that a receiving

country will enforce the statutory criteria on the receiving entity. Absent that guarantee no exports could be permitted by the NMFS.

CONCLUSION

This comment suggests that the NMFS proposed rules should hold transferee-recipients of marine mammals obtained via the proposed rules to the same standards and requirements proposed for permit holders. This comment additionally suggests that the Supreme Court has recognized the 'inherent power' of Executive Branch Agencies such as the NMFS to form Executive Agreements with foreign nations. This power is not unlimited rather the scope of these Agreements is cabined by the substantive provisions of the appropriate enabling or organic act.